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Hampshire Residences Joint Management Body v Zelan Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22-NCVC-453–07 OF 2013
ROSNAINI SAUB J
28 FEBRUARY 2014

Contract — Privity — Privity of contract — Joint management body ('JMB') instituted action against developer due to defects in common facilities of residences — Proper parties to bring action — Whether JMB had locus or legal standing — Sale and purchase agreement signed between purchasers and developer — Whether purchasers proper parties to commence action

The plaintiff was a joint management body ('JMB') for Hampshire Residences while the defendant was the developer for the same. The plaintiff instituted this action against the defendant arising out of the defects in the common facilities of the Hampshire Residences. The plaintiff averred that despite numerous representations by the defendant to rectify and repair the defects, it had until to date failed to do so. In the present application, the defendant sought to strike out the plaintiff's claim pursuant to O 18 r 19(1)(a), (b) and/or (c) of the Rules of Court 2012 on the main ground that the plaintiff had no locus or legal standing to file this claim against the defendant. The defendant submitted that the proper party to bring this sort of claim were the purchasers of the condominium units either individually or collectively as the claim for defect in the common facilities would fall under the sale and purchase agreement signed between the purchasers and the defendant as developer. It was argued by the defendant that the plaintiff was merely a temporary body established under the said Act to maintain and manage the common properties or facilities of Hampshire Residences. The plaintiff on the other hand contended that since it had a statutory duty to maintain and manage the common properties and facilities of Hampshire Residences, it therefore had the power and legal standing to sue the defendant for the defects to the common facilities. The plaintiff also claimed that there was negligence on the part of the defendant in providing the common facilities that were defective and the defendant had failed to honor the many representations it had made to rectify the defects. The issue that arose was whether the plaintiff as JMB was entitled in law to sue the defendant as developer for defects of common properties or facilities.

Held, allowing the defendant's application with costs of RM3,000:

(1) It was obvious that the plaintiff's claim was related to defect of the common properties and for the rectification costs. A claim of this nature

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was and should be based on a contractual claim. Only the purchasers of the condominium units would have privity of contract with the defendant vide their respective sale and purchase agreement. Under the standard sale and purchase agreement, the duty to construct the common properties in good and workmanlike manner fell on the defendant as developer. Clause 27.1 of the sale and purchase agreement made it the responsibility for the defendant to make good any defects to the individual parcel unit and to the common properties within the stated defect liability period. In other words, the defendant as the developer was under the contractual duty to the purchasers, individually and collectively, to made good or rectify any defect to any particular parcel or to the common facilities (see para 7).

(2) The plaintiff was a separate entity from the purchasers. Its duty, obligation and powers relating to common property was the same as that of a management corporation established under the Strata Title Act 1985, to wit, the maintenance and management of the common property. The scope of duty of the plaintiff in maintaining and managing the common properties did not extend to suing the defendant for defects arising out of the construction of the common facility. Defects arising out of the construction of the common facilities gave rise to a contractual claim against the developer/defendant by the purchasers but not the plaintiff. Further, there was no express power given by the said Act for the plaintiff to make a claim of this nature against the developer/defendant (see para 8).

(3) The plaintiff seemed to also rely on a claim based on negligence against the defendant for the alleged defects to the common properties. The plaintiff's allegation of the defendant's negligence lacked in particulars. It was not pleaded in what manner the defendant was said to have a duty of care to the plaintiff at the time the common facilities were constructed. At the time of construction, the plaintiff as a JMB had yet to exist. The plaintiff's claim was more of a nature of contractual claim and not under tort. The claim was for making good or rectification of the defects and costs of such rectification. However, the plaintiff had no contractual relationship with the defendant (see para 9).

[Bahasa Malaysia summary

Plaintif adalah badan pengurusan bersama ('BPB') untuk Hampshire Residences manakala defendan adalah pemaju untuk yang sama. Plaintif telah memulakan tindakan ini terhadap defendan berdasarkan kerosakan dalam kemudahan bersama Hampshire Residences. Plaintif menegaskan bahawa meskipun pelbagai representasi oleh defendan untuk memperbetul dan memperbaiki kerosakan itu, sehingga sekarang ia masih gagal untuk berbuat demikian. Dalam permohonan ini, defendan memohon untuk membatalkan tuntutan plaintif menurut A 18 k 19(1)(a), (b) dan/atau (c) Kaedah-Kaedah

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Mahkamah 2012 atas alasan utama bahawa plaintif tiada locus atau kedudukan undang-undang untuk memfailkan tuntutan ini terhadap defendan. Defendan berhujah bahawa pihak yang wajar untuk memulakan tuntutan sebegini adalah pembeli-pembeli unit-unit kondominium sama ada secara individu atau secara kolektif kerana tuntutan untuk kerosakan kepada kemudahan-kemudahan bersama adalah terangkum di bawah perjanjian jual beli yang telah ditandatangani antara pembeli-pembeli dan defendan sebagai pemaju. Adalah dihujahkan oleh defendan bahawa plaintif hanya badan sementara yang ditubuhkan di bawah Akta tersebut untuk menyelenggara dan menguruskan hartanah atau kemudahan bersama Hampshire Residences. Plaintif sebaliknya berhujah bahawa oleh kerana ia mempunyai kewajipan statutori untuk menyelenggara dan menguruskan hartanah dan kemudahan bersama Hampshire Residences, ia dengan itu mempunyai kuasa dan kedudukan undang-undang untuk menyaman defendan bagi kerosakan kepada kemudahan bersama itu. Plaintif juga mendakwa bahawa terdapat kecuaian di pihak defendan yang menyediakan kemudahan bersama itu yang rosak dan defendan telah gagal untuk menepati representasi-representasi yang telah dibuat olehnya untuk memperbetulkan kerosakan-kerosakan itu. Isu yang timbul adalah sama ada plaintif sebagai BPB berhak di sisi undang-undang untuk menyaman defendan sebagai pemaju untuk kerosakan-kerosakan hartanah atau kemudahan bersama.

Diputuskan, membenarkan permohonan defendan dengan kos sebanyak RM3,000:

(1) Adalah jelas bahawa tuntutan plaintif adalah berkaitan kerosakan hartanah bersama dan untuk kos pembetulan. Tuntuan bersifat sedemikian adalah dan patut berasaskan tuntutan kontraktual. Hanya pembeli-pembeli unit-unit kondominium patut mempunyai priviti kontrak dengan defendan melalui perjanjian jual beli masing-masing. Di bawah perjanjian jual beli yang standard, kewajipan untuk membina hartanah bersama dengan cara dan kemahiran kerja yang baik terletak pada defendan sebagai pemaju. Fasal 27.1 kepada perjanjian jual beli menjadikannya tanggungjawab defendan untuk memperbaiki apa-apa kerosakan kepada unit petak individu dan kepada hartanah bersama dalam tempoh liabiliti kerosakan yang telah dinyatakan. Dalam erti kata lain, defendan sebagai pemaju adalah di bawah kewajipan kontraktual kepada pembeli-pembeli, secara individu dan secara kolektif, untuk memperbaiki atau memperbetulkan apa-apa kerosakan kepada mana-mana unit tertentu atau kepada kemudahan bersama (lihat perenggan 7).

(2) Plaintif adalah entiti berasingan daripada pembeli-pembeli. Kewajipan, obligasi dan kuasanya berkaitan hartanah bersama adalah sama dengan perbadanan pengurusan yang ditubuhkan di bawah Akta Hak Milik Strata 1985, iaitu, penyelenggaraan dan pengurusan hartanah bersama.

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Skop kewajipan plaintif dalam menyelenggara dan menguruskan hartanah bersama tidak diluaskan untuk menyaman defendan untuk kerosakan yang berlaku akibat pembinaan kemudahan bersama. Kerosakan yang berlaku akibat pembinaan kemudahan bersama menimbulkan tuntutan kontraktual terhadap pemaju/defendan oleh pembeli-pembeli tetapi bukan plaintif. Selanjutnya, tiada kuasa yang jelas diberikan oleh Akta tersebut untuk plaintif membuat tuntutan bersifat sedemikian terhadap pemaju/defendan (lihat perenggan 8).

(3) Plaintif juga dilihat bergantung kepada tuntutan yang berasaskan kecuaian terhadap defendan untuk kerosakan yang dikatakan berlaku kepada hartanah bersama itu. Pengataan plaintif tentang kecuaian defendan tidak mempunyai butiran yang mencukupi. Tidak dipli dalam cara apa defendan dikatakan mempunyai kewajipan berjaga-jaga kepada plaintif pada masa kemudahan bersama itu dibina. Pada masa pembinaan itu, plaintif sebagai BPB masih tidak wujud. Tuntutan plaintif lebih bersifat tuntutan kontrak dan bukan di bawah tort. Tuntutan itu adalah untuk pembaikan atau pembetulan kerosakan-kerosakan dan kos pembetulan tersebut. Walau bagaimanapun, plaintif tiada hubungan kontrak dengan defendan (lihat perenggan 9).]

Notes

For cases on privity of contract, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5859–5866.

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 s 4
Rules of Court 2012 O 18 r 19(1)(a), (b), (c)

Rosnaini Saub J:

DECISION (ENCL 9)

[1] The plaintiff in this case is a joint management body ('JMB') for Hampshire Residences (a high rise condominium) established pursuant to s 4 of the Building and Common Property (Maintenance and Management) Act 2007 ('the said Act'). The defendant is the developer for the said Hampshire Residences.

[2] The plaintiff instituted this action against the defendant arising out of the defects in the common facilities of the Hampshire Residences, specifically as follows:

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(a) defective interface intercom rendering it to be non-operational and claim the sum of RM441,000 as costs of rectifying the defect;

(b) defect to the swimming pool's floor tiles in that the tiles have detached from the floor and claim for a sum of RM2,200,690 as costs of rectifying the defect; and

(c) defect to the water features where they suffered the same problem as the swimming pool, ie the floor tiles were found to have detached from the floor and claim a sum of RM406,424 as costs of rectifying the defect.

The plaintiff averred in its pleading that despite numerous representations by the defendant to rectify and repair the defects, it has until to date fail to do so.

[3] This is an application by the defendant in encl 9 to strike out the plaintiff's claim pursuant to O 18 r 19(1)(a), (b) and/or (c) of the Rules of Court 2012.

[4] The main ground relied upon by the defendant in support of this application is that the plaintiff has no locus or legal standing to file this claim against the defendant. According to the defendant as argued by its counsel, the proper party to bring this sort of claim are the purchasers of the condominium units either individually or collectively as the claim for defect in the common facilities falls under the sale and purchase agreement signed between the purchasers and the defendant as developer. The plaintiff is merely a temporary body established under the said Act to maintain and manage the common properties or facilities of Hampshire Residences.

[5] The plaintiff on the other hand contended that since it has a statutory duty to maintain and manage the common properties and facilities of Hampshire Residences, it therefore has the power and legal standing to sue the defendant for the defects to the common facilities. The plaintiff also claims that there was negligence on the part of the defendant in providing the common facilities that were defective and the defendant has failed to honour the many representations it has made to rectify the defects.

[6] I think this case brought to the front a very interesting question, that is, whether the plaintiff as JMB is entitle in law to sue the defendant as developer for defects of common properties or facilities. It is not in dispute that the interface intercom, the swimming pool and the water features are common properties of Hampshire Residences.

[7] I have perused the entire statement of claim of the plaintiff and it is obvious that the plaintiff's claim is related to defect of the common properties and for the rectification costs thereof. It is my considered opinion that the

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claim of this nature is and should be based on a contractual claim. In this respect, only the purchasers of the condominium units have privity of contract with the defendant vide their respective sale and purchase agreement. Under the standard sale and purchase agreement (exh D1 of the defendant's affidavit in support), the duty to construct the common properties in good and workmanlike manner fell on the defendant as developer. Clause 27.1 of the sale and purchase agreement made it the responsibility for the defendant to make good any defects (to the individual parcel unit and to the common properties) within the stated defect liability period. In other words, the defendant as the developer is under the contractual duty to the purchasers, individual and collectively, to made good or rectify any defect to any particular parcel or to the common facilities.

[8] The plaintiff is a separate entity from the purchasers. Its duty, obligation and powers in so far as it relates to common property is the same as that of a management corporation established under the Strata Title Act 1985, to wit, the maintenance and management of the common property. In my opinion the scope of duty of the plaintiff in maintaining and managing the common properties does not extend to suing the defendant for defects arising out of the construction of the common facility. Defects arising out of the construction of the common facilities give rise to a contractual claim against the developer/defendant by the purchasers but not the plaintiff. Further, there is no express power given by the said Act for the plaintiff to make a claim of this nature against the developer/defendant.

[9] The plaintiff seems to also rely on a claim based on negligence against the defendant for the alleged defects to the common properties. Firstly, I find that the plaintiff's pleading regarding negligence of the defendant is lacking in particulars. It was not pleaded in what manner the defendant is said to have a duty of care to the plaintiff at the time the common facilities were constructed. It is to be noted that at the time of construction, the plaintiff as a JMB is yet to exist. Secondly, as I have alluded to earlier, the plaintiff's claim is more of a nature of contractual claim and not under tort. This is because the claim is for making good or rectification of the defects and costs of such rectification. However, the plaintiff has no contractual relationship with the defendant.

[10] In the circumstances, I agree with the defendant's counsel that the plaintiff does not have a legal standing to make the present claim against the defendant. In other words, the plaintiff has no reasonable cause of action recognised by the law.

[11] For the record, the plaintiff has filed an application to substitute the name of the plaintiff as a Hampshire Residences JMB to the Hampshire management corporation because the management corporation under the

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Strata Title Act 1985 has now been incorporated to replace the plaintiff. Suffice it to say that this court decision will be the same irrespective if the plaintiff is the JMB or the management corporation.

[12] Based on the reasons stated, I hereby allow the defendant's application in encl 9 with costs of RM3,000.

[13] Consequently the plaintiff's application in encl 18 is hereby also struck of as it no longer has any foundation to stand and with no order as to costs.

Defendant's application allowed with costs of RM3,000.

Reported by Afiq Mohamad Noor